Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1977
No. 77-101

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors,

KARL CUNNINGHAM and JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM, DIANE MARIE CUNNINGHAM and KAREN KAY CUNNINGHAM, minors,

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors,

JOHN H. WHITE and NORMA WHITE, his wife, suing in their own right and as parents and natural guardians of NATALIE WHITE and STEPHANIE WHITE, minors,

WILLIAM VISS and CHARLOTTE VISS, his wife, suing in their own right and as parents and natural guardians of STANLEY VISS, CAROL VISS and JONATHAN VISS, minors,

Petitioners

vs.

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRAEL PACKELL, Attorney General; of the Commonwealth of Pennsylvania

and

HAROLD MARTIN, STEVEN RHODES, ROBERT VEON, HARRY FRY, RONALD STURM, PETER DeCARO, BOB HAGEN, JOHN RUKAS and DOM CASEY and their successors in office, Directors of Big Beaver Falls Area School District

and

LeROY STEWART, ROBERT CAUGHNER, DAVID GROPP, AMELIA FUSCO, ROBERT AMALIA, ROBERT BERNHARDY, WILLIAM LIEBERMAN, WILLIAM G. DANNELS and BILLIE WALLACE and their successors in office, Directors of Blackhawk School District

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
Petition for Writ of Certiorari	1
(a) Opinion Below	1
(b) Jurisdictional Grounds	2
(c) Questions Presented for Review	3
(d) Statutory and Constitutional Provisions Involved	4
(e) (f) (g) Stage of Proceeding	7
(h) Arguments for Allowance of Writ	8
Conclusion	25

TABLE OF CITATIONS

CASES:

Abingdon School Dist. v. Schempp, 374 U.S. 203 (1963) 8, 20

Board of Education v. Allen, 392 U.S. 236 (1968) .. 9

Cunningham v. Macon & Brunswick R. Co., 109 U.S. 446 (1883) 14

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974) 13, 14, 15, 23

Elrod v. Burns, U.S. , 49 L.Ed. 2d 547, 96 S.Ct. (1976) 9, 10

Everson v. Board of Education of Ewing Township et al., 330 U.S. 1 (1947) , 67 S.Ct. 504 .....8, 9, 19, 21

Ex Parte New York, 256 U.S. 490 (1921) 14
Ex Parte Young, 209 U.S. 123, 52 L.Ed. 714 .....13, 14, 15
Goldberg v. Kelly, 397 U.S. 254 (1970) 13, 14
Graham v. Richardson, 403 U.S. 365 (1971) 9, 10, 13, 14, 19
Lemon v. Kurtzman, 403 U.S. 602 (1971) 9, 23
Pierce v. Society of Sisters, 268 U.S. 510 (1925) .. 8, 9, 20, 24½
Poindexter v. Greenhow, 114 U.S. 270 (1885) 14
Shapiro v. Thompson, 394 U.S. 633 (1968) 9, 10, 19
Sherbert v. Verner, 240 S.C. 286, 374 U.S. 398 ..... 8, 9, 10, 19, 21, 22, 24, 24½
Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 .....22, 24½
Sylvia Meek et al. v. John C. Pittenger (1975), 43 L.W. 4596 ..... 9, 23
Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 ..... 24½
Thompson v. Shapiro, 397 U.S. 168 (1969) 14
Torcaso v. Watkins, 367 U.S. 488 (1961) 9, 18, 19
U. S. v. Ballard, 322 U.S. 78 .....17, 19
U. S. v. Seeger, 380 U.S. 163 (1965) 9, 18, 19
Welsh v. U. S., 398 U.S. 333 (1970) 9, 18, 19
Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed. 2d 15 .....8, 9, 10, 20

CONSTITUTIONS:

Constitution of the Commonwealth of Pennsylvania, Art. III, Section B-15 5

United States Constitution:
First Amendment 3, 7
Eleventh Amendment 12
Fourteenth Amendment 3, 7

STATUTES:

Pennsylvania School Code, 24 Purdon's Statutes:
§2-213 ..... 4, 15
§6-602 4
§6-603 4
§6-610 4
§6-652 4
§6-674 4
§6-679 4
§6-680 4
§6-686 4
Tax Act of 1963 for Education, 1956, March 6, P.L. (1955) 1228, 72 Purdon's Statutes:
§3403-201 ..... 5, 6
§3403-604.1 6
Act of June 25, 1948, C. 646, §1, 62 State. 928, 28 USCS Sec. 1254 2
28 USC 1331, et seq. 3, 7
28 USC 1343 (3) (4) 3, 7
28 USC 2201 et seq. 3, 7
28 USCA §2281 et seq. 7

OTHER AUTHORITIES:

Mirror for Man, Clyde Kluckholn, Whittlesey House, McGraw Hill Book Company, Inc., New York, p. 282 11
National Courier, September 3, 1976: Secular Humanism: The Last Bell Rings by Bill Willoughby 10

PETITION FOR WRIT OF CERTIORARI

Now Come Plaintiffs-Appellants in the captioned matter and, pursuant to Rule 23, petition Your Honorable Court to issue a Writ of Certiorari herein upon the following grounds:

(a) OPINION BELOW

This writ is sought from the Order of the Court of Appeals for Third Circuit entered on the 19th day of April, 1977 by Judges Aldisert, Garth and Stapleton, a copy of which is appended hereto pursuant to rule.

(b) JURISDICTIONAL GROUNDS

(i) The judgment concerning which review is sought was entered on the 19th day of April, 1977.

(ii) No rehearing on extensions of time have been sought herein.

(iii) Your Honorable Court has power to issue the writ prayed for by virtue of Act of June 25, 1948, C.646 §1, 62 Stat. 928, 28 USCS §1254.

(c) QUESTIONS PRESENTED FOR REVIEW

(1) Where a complaint in equity by federal citizens raises claims of state action in infringement of their rights under the First and Fourteenth Amendments and seeks prospective participation in a state public welfare fund as a remedy, does the doctrine of sovereign immunity bar such a claim? *(Answered in the negative.)*

(2) Where such a complaint is filed initially against "Commonwealth of Pennsylvania" "Big Beaver Falls School District" and "Blackhawk School District", is its dismissal on sovereign immunity grounds res judicata to a second action by the same plaintiffs raising identical constitutional issues but filed against named office holders of the Commonwealth and individual Board members of the districts? (*Answered by Appellants in the negative.*)

(3) Does an allegation by federal citizens that state schools have established a "religion of humanism" by taxation which plaintiffs by compulsion pay and in which they are denied participation because of their exercise of their religious conviction raise a substantive federal question under the First and Fourteenth Amendments to the United States Constitution and the provisions of 28 USC 1331, et seq.; 28 USC 2201 et seq.; 28 USC 1343 (3) (4) ? *(Answered by Appellants in the affirmative.)*

(4) Where appellants have alleged that state action in excluding them from equal participation in an ex-

isting public welfare fund because of their exercise of First and Fourteenth Amendment rights in securing non-state education for their children constitutes a pressing burden on that exercise of right, and where appellees have procedurally admitted the factual allegations underlying the constitutional grievance by filing motions to dismiss, are appellants entitled to a trial on the issues raised? *(Answered by appellants in the affirmative.)*

(5) Where it is alleged and procedurally admitted by motions to dismiss that the Pennsylvania Constitution and School Code (as cited hereafter) operate to compel appellants to choose between either:

1. Accepting "public" school education in order to avail themselves of said public welfare school tax funds, in violation of their religious convictions on the one hand, or:

2. Maintaining their religious faith by foregoing their rightful share in said public tax monies and purchasing education at added cost while still paying public school tax on the other, in violation of the same religious convictions,

is a question of infringement by state action of First Amendment rights thereby raised? *(Answered in the affirmative.)*

(d) STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Appellants' contentions involve the following statutory or constitutional provisions:

(i) Provisions of the Pennsylvania School Code; 24 Purdon's Statutes §2-213, 6-602, 6-603, 6-610, 6-652, 6-674, 6-679, 6-680 and 6-686. (See Appendix p. 48a.)

(ii) The Constitution of the Commonwealth of Pennsylvania, Art. III, Section B-15:

PUBLIC SCHOOL MONEY NOT AVAILABLE TO SECTARIAN SCHOOLS. Section 15. No money raised for the support of the Public Schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

(iii) Provisions of the Pennsylvania "Tax Act of 1963 for Education." 1956, March 6, P.L. (1955) 1228, 72 Purdon's Statutes 3402-201 et seq.

§3403—201. Imposition of tax

(a) There is hereby imposed upon each separate sale at retail as defined herein within this Commonwealth a tax of five (5) per cent of the purchase price, which tax shall be collected by the vendor from the purchaser, and shall be paid over to the Commonwealth as herein provided.

(b) There is hereby imposed upon the use, on and after the effective date of this act, within this Commonwealth of tangible personal property purchased at retail on or after March 7, 1956, and on those services described herein purchased at retail on and after April 15, 1959, a tax of five (5) per cent of the purchase price, which tax shall be paid to the Commonwealth by the person who makes such use

as herein provided, except that such tax shall not be paid to the Commonwealth by such person where he has paid the tax imposed by subsection (a) of this section or has paid the tax imposed by this subsection (b) to the vendor with respect to such use. The tax at the rate of five (5) per cent imposed by this subsection shall not be deemed applicable where the tax has been incurred at the rate of three per cent or three and one-half per cent or four percent under this subsection prior to this amendment.

(c) Notwithstanding any other provisions of this act, the tax with respect to intrastate telephone service and intrastate telegraph service within the meaning of clause (*l*.1) of section 2 of this act shall, except for telegrams paid for in cash at telegraph offices, be computed at the rate of five (5) percent upon the total amount billed to customers periodically for such services, irrespective of whether such billing is based upon a flat rate or upon a message unit charge. 1956, March 6, P.L. (1955) 1228, art. II, §201, added 1956, May 24, P.L. (1955) 1707, §5, as amended 1959, April 15, P.L. 20, §3; 1959, June 9, P.L. 461, §1; 1959, Aug. 20, P.L. 729, §8; 1959, Nov. 21, P.L. 1556, §10; 1963, May 29, P.L. 49, §7.

§3403—604.1 Disposition of proceeds.

All taxes collected under the provisions of this act as amended shall be used for purposes of public education in so far as permitted by the requirements of the Constitution of Pennsylvania. 1956, March 6, P.L. (1955) 1228, art. VI, §604.1, added 1959, April 15, P.L. 20, §12, as amended 1963, May 29, P.L. 49, §18.

(e) (f) (g) STAGE OF PROCEEDING

Appellants filed suit in Equity in the U.S. District Court for the Western District of Pennsylvania on October 30, 1975 praying for appointment of a 3 Judge Court under 28 USCA §2281 et seq. to hear allegations of infringement of First and Fourteenth Amendment Rights and claiming jurisdiction under 28 USC §1331 et seq.; 28 USC §2201 et seq.; 28 USC 1343(3), (4) as amended. Appellees filed motions to dismiss which were granted by opinion and order of Miller, J. on April 26, 1976. Appeal to the Court of Appeals for the Third Circuit followed, and on April 18, 1977 the Third Circuit affirmed the ruling of the District Court.

(h) ARGUMENTS FOR ALLOWANCE OF WRIT

(1) Fundamentally, the writ must issue because appellants are *being denied access to the Courts* for trial on issues which this Court has time and again perceived to be *"a highly sensitive constitutional area", Sherbert v. Verner,* 374 U.S. 398, p. 406. The allowing of appellants' claim will only give them a day in court; a *chance to prove* their claim. If this access is denied them, what right have the courts to hold themselves out as a forum for the peaceable adjustment of grievances?

(2) If anything the gravamen of the complaint is heightened by its constitutional base on which plaintiffs claim to be the victims of an economic classification resting on *religious grounds which have been vindicated by this court* in *Pierce* and *Yoder;* to wit; the *religious* freedom to select non-state schooling for their children without being "hampered:" (*Everson*, p. 16) or handicapped (*Schempp*). The Court itself has summarized the critical nature of these—as yet unheard—claims in the following language:

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."
>
> (*Wisconsin v. Yoder,* 406 U.S. 205, 216.)

(3) Legal questions arising from the nexes between state welfare funding and non-state education and parents' rights concerning the education of their children have involved a major part of the Court's caseload in recent years.[1] But none of these cases have *merged* these legal questions, to wit:

1. Parents' rights to select non-state education for their children. (*Pierce-Yoder*)

2. Parents' standing as taxpayers to participate in public welfare funds.[2]

3. The nature of religion and the value system of the state schools as reflecting religious values.[3]

4. The legal consequences of a citizen being excluded from the benefits of a public welfare fund by virtue of his exercise of the right to opt for non-state schooling for his children.[4]

Thus appellants have raised most serious questions of Federal law as yet unresolved by our courts, yet which arise implicitly from positive law set down in the cases referred to, supra. That First Amendment decisions are not "fungi-

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[1] *Everson v. Board of Education,* 330 U.S. 1 (1947), 67 S.Ct. 504; *Alton J. Lemon et al. v. David H. Kurtzman,* 403 U.S. 602 (1971); *Board of Education v. Allen,* 392 U.S. 236 (1968); *Sylvia Meek et al. v. John C. Pittenger* (1975), 43 L.W. 4596; *Wisconsin v. Yoder,* 406 U.S. 205; *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

[2] See: *Sherbert v. Verner,* 374 U.S. 398; *Graham v. Richardson,* 403 U.S. 365 (1971); *Shapiro v. Thompson,* 394 U.S. 633 (1968).

[3] *Torcaso v. Watkins,* 367 U.S. 488 (1961); *U.S. v. Seeger,* 380 U.S. 163 (1965); *Welsh v. U.S.,* 398 U.S. 333 (1970).

[4] *Sherbert, Graham, Shapiro,* supra; *Elrod v. Burns* infra.

bles" is recognized, yet it still remains true that the base of all First Amendment claims rests in the life of the Federal citizen as his constitutionally preserved freedoms move to expression in his various daily concerns whether they be employment (*Sherbert; Elrod v. Burns,* —— U.S. ——, 49 L.Ed. 2d 547, 96 S.Ct. —— (1976)) education (*Yoder*) politics (*Elrod*) or interstate travel (*Graham, Shapiro*).

(4) A new dimension of Federal law significance is reached in appellants' cause by the allegation, *procedurally admitted,* that appellees have established a religion of secular values in their schools. This allegation is new to the courts but not to the public media [5] or to appel-

[5] "National Courier, September 3, 1976: Secular Humanism: The Last Bell Rings By Bill Willoughby National Courier Correspondent: Washington—The House of Representatives has approved an amendment to the National Defense Education Act which could have profound effects in curbing the infusion of secular humanism in public school courses.

The amendment prohibits the Federal Government from authorizing grants, contracts, or support for educational programs, curriculum research and development, administrator and teacher orientation, and other projects involving any aspect of the religion of secular humanism.

Representative John Conlan, Republican of Arizona, had also previously introduced a similar amendment to a National Science Foundation spending bill, but it was narrowly defeated. The Foundation has funded the development of many of the textbooks and courses which have been protested by parents' groups.

Mr. Conlan said his amendment is a legislative and constitutional necessity because it touches at the heart of academic freedom.

lees' schools themselves. For example a text employed by Blackhawk School District calls for orderliness of internal social change in the following language: [6]

> "The internal change must arise from the development of a faith which should give meaning and purpose to living but which *could be believed in by a reasonable man familiar with what we have learned of our world by scientific methods.* As wide an induction as anthropology can offer is that every society desperately needs morality in the sense of common standards, and religion in the sense of orientations toward such inescapable problems as death, individual responsibility, and other ultimate value attitudes. Religion in this sense is absolutely necessary to promote social solidarity and individual security by affirming and symbolically enacting a system of common purposes. In my opinion, a faith is required which would not force intellectual reserva-

The concept of academic freedom has been virtually destroyed in some circles, he added, by the false assumption that the secular humanist stance is religiously neutral.

Mr. Conlan believes nothing could be further from the truth. He cites a 1961 Supreme Court case (Torcaso v. Watkins) which held that secular humanism is a religion.

'Secular humanism declares that there is no God, that man is his own god,' Mr. Conlan said. 'Educators advocating a secular humanist view consistently exclude from the classroom any teaching of moral and ethical principles based on the Judeo-Christian belief in God.'"

[6] *Mirror for Man* by Clyde Kluckhohn, Whittlesey House, McGraw Hill Book Company Inc., New York, p. 282.

> tion or conflict or compartmentalization. Such a faith cannot today, I believe, successfully be based upon supernatural premises. It must needs be a secular religion. There is nothing whatsoever in the sciences of human behavior which denies the existence of 'absolutes' in and for human conduct. However, a humanistic science does assert that these absolutes can and must be validated by empirical observation rather than by documents pretending to supernatural authority."

This patent call for secular religion must evoke the Court's concern for its impact on the highly valued freedoms of appellants in the interest of their children as detailed in paragraphs 17, 18, and 19 of the complaint; and it should —*must*—be emphasized here that appellants seek only a day in court; a forum; a *chance* to competently prove their claims. The violence done to them is that the doors of the Court to this juncture have been slammed in their faces. If truth fears no inquiry, then the educational "system" espoused by government should fear no examination, and the courts, most of all, should not stoop to excavate escape routes for that same system when it is faced with jural inquiry.

(5) The opinion of the Third Circuit conflicts with applicable decisions in several areas.

(i) The Eleventh Amendment Cases:

The opinion disputed by this petition holds that the prior dismissal of the action was warranted under the 11th Amendment:

> "After careful and thorough analysis, the district court in the prior action determined that the

> claim was barred by sovereign immunity, and we affirmed that determination. The 'essential nature and effect' of the present proceeding is identical to that of the prior action. The prior determination therefore, continues to control."

However, this reasoning wholly misses appellants' prayer for relief in the light of *Edelman v. Jordan,* 415 U.S. 651, 39 L.Ed. 2d 662 (1974). The complaint seeks only equal per capita distribution of the school tax fund—a fortiori an *existing* fund; an *existing* appropriation. No additional appropriation need be made to effect an equal distribution of that which already exists. Here *Edelman* becomes apposite. Here the court upheld, a District Court decree awarding prospective relief in reliance upon *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), noting that (p. 667):

> "The injunction issued in *Ex Parte Young* was not totally without effect on the state's revenues, . . ."

Proceeding to view a line of "welfare" cases the Court observed at p. 668:

> "But the fiscal consequences to State Treasures in these cases (*Graham v. Richardson,* 403 U.S. 365 (1971), and *Goldberg v. Kelly,* 397 U.S. 254 (1970)) were the necessary result of compliance with decrees which by their terms were *prospective in nature.*" (Emphasis supplied.)

Hence, when appellants seek *prospective* participation in a tax fund under equity jurisdiction the prospective nature of the relief finds sanction against 11th Amendment

strictures under *Ex Parte Young, Graham v. Richardson, Goldberg v. Kelly,* and *Thompson v. Shapiro,* 397 U.S. 168 (1969).

Thus the court missed the point of its own cited authority:

> "It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. *Edelman v. Jordan,* 415 U.S. 651 (1974); *Poindexter v. Greenhow,* 114 U.S. 270, 287 (1885); *Cunningham v. Macon & Brunswick R. Co.,* 109 U.S. 446 (1883). Its applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'" *Ex Parte New York,* 256 U.S. 490, 500 (1921).

precisely because it failed to consider the *essential nature and effect of the proceeding,* to wit; prospective participation in an existing fund.

(ii) Relief Flowing From Substantive Federal Rights:

However, the argument does not rest here alone, for a deeper and more important perception than the prospective retroactive distinction was made in *Edelman.* The portion of the District Court's opinion in *Edelman* that was reversed:

> ". . . requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation . . ." (p. 668) which

> is: "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."

Hence, by negative inference, where a substantive federal question is adjudicated, future compliance with the adjudication may require "fiscal consequences" of state treasures, while a recovery for breach of duty may remain barred. Obviously, appellants' cause is both substantive and federal, thus escaping the post-*Young* strictures.

The last point appellants urge in seeking consideration of their case is that if the issue may be reached despite *Edelman,* sovereign immunity is waived by terms of the Pennsylvania Public School Code of 1949:

> "§2-213
>
> Each school district shall have the right to sue and be sued in its corporate name. Any legal process against any school district shall be served on the president or secretary of its board of school directors, 1949, March 10, P.L. 30, Art. II §213, 24 P.S. §2-213."

(iii) Appellants Seek Religious Freedom—a Substantive Federal Question:

At this point it becomes vital to see that appellants' case is not a "tax" case, nor even an economic case, but at root is a matter of free exercise of religious freedom; the economic side of the case is the burden complained of, not the root freedom expressed. This section will therefore develop the constitutional decisional base of that free-

dom, for the decision complained of conflicts implicitly with the "free exercise" cases.

The Meaning of Religion

To Plaintiffs in this action "religion" means much more than that which transpires inside a house of worship. Most simply, in Plaintiffs' eyes, religion is synonymous with "world view" or "value system". Hence, any educational process that deals with the nature of man and his surrounding circumstances carries with it deeply religious values as to man's identity and purpose. The conflict between Plaintiffs' Christian world view and that taught in Defendants' schools is summarized in paragraph 21 of the complaint (see Appendix, pp. 8a-9a). Defendants have procedurally admitted these allegations, so that on the present posture of the case the following (as summarized from the complaint) may be deemed admitted:

I. That plaintiffs are compelled to support the educational institutions of defendants. Paragraphs 12, 13, 14, 15.

II. That plaintiffs pay additional educational costs for their children to attend certain Christian day schools. Paragraph 16.

III. That plaintiffs' religious convictions as Christians impel them to "raise their children in the nurture and admonition of the Lord" which includes formal education in Christian day schools. Paragraphs 17, 18.

IV. That plaintiffs' religious faith commits them to a Christian world view in light of which "no

truth, teaching, fact or educational philosophy" can be neutral. Paragraph 19.

V. That defendants' operations are, in toto, dominated by the religious philosophy of secularism or secular humanism which is "hostile to and diametrically opposed to" the religion of plaintiffs. Paragraphs 20, 21, 22, 24.

VI. That the defendants' schools are religiously closed to the plaintiffs; that plaintiffs' religious sensibilities are done violence by the compulsion to support defendants' operations when coupled with the absence of equitable return from the public welfare fund to which they (under compulsion) contribute. Paragraphs 22, 23, 25.

VII. That defendants' taxing and educational policies constitute an immediate impairment of plaintiffs' exercise of religion and parental rights in the religious instructions of their children. Paragraphs 25, 26, 27.

On this state of the record, then the religious conflict over the state's educational values and those of the Plaintiffs is patent. Query: Does Plaintiffs' more expansive view of religion remain under the protection of the free-exercise clause?

First, Plaintiffs are not in court to convince the Court of the truth of their world view as an Evangelist might do, but rather to maintain their liberty to instruct their children in the Christian world view. Hence the Court's ruling in *U.S. v. Ballard,* 322 U.S. 78, preserves Plaintiffs' right to believe as they do free of restraint or opposition by government.

Second, the Court itself has seen that religious values and religion are not solely theistic or restricted to the grounds of the cathedral. In *Torcaso v. Watkins,* 367 U.S. 488 (1961), the Court vindicated the freedom of Torcaso to hold political office free of imposition of a governmentally required belief in God and in footnote 11 (p. 495) noted:

> "Among religions in the country which do not teach what would be generally considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."

This must have the force of holding, else Torcaso's unbelief, or belief in *another* value system, would not be protected under the free exercise clause. Hence "secular" values can have the force of either religious freedom or religious oppression.

In another series of cases the court has perceived a broader scope to religion than that traditionally afforded it. In *U.S. v. Seeger,* 380 U.S. 163 (1965), and later in *Welsh v. U.S.,* 398 U.S. 333 (1970), the court was confronted with the question of whether or not the theistically phrased conscience clause of the draft laws also operated to exempt from military service those who had qualms of conscience toward taking of human life on non-theistic grounds. In these cases the court held that a deeply-held value system was the equivalent of the more traditional theistic conception of the term religion:

> "Because his beliefs function as a religion in his life." (*Welsh,* p. 340)

> "A sincere and meaningful belief which occupies in the life of its possessor a place *parallel to that filled by the God of those admittedly qualifying* for the exemption comes within the statutory definition". (*Seeger,* p. 176)

Hence, Plaintiffs' religious conviction that education is also a religious matter finds sanction under *Ballard,* supra, and support under *Torcaso, Seeger* and *Welsh,* supra, so that it may take its place equally among the other constitutionally preserved freedoms vindicated by this Court.

A Public Welfare Fund

Specifically, the freedom of religion claim as explained above is here brought to bear upon a public welfare fund, and thus stands squarely under a line of cases which have consistently held that a federal citizen may not be barred from participation in public welfare funds by a requirement which constrains the exercise of a constitutionally guaranteed right. (*Everson, Sherbert, Shapiro,* supra.) That we here deal with a "public welfare fund" clearly flows from prior decisions. *Sherbert* dealt with unemployment compensation; *Shapiro* and *Graham* with public assistance payments, and *Everson* with school bus funding which was designated at p. 16 as public welfare legislation. In *Shapiro* the court specifically analogized school costs to the public welfare framework at p. 633:

> "It [the State] could not, for example, reduce expenditures for education by barring indigent children from its schools."

Stated summarily, the freedom claim rests squarely on the *Pierce* and *Yoder* decisions where the Court in *Yoder* stated:

> "However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children."

Coupled with this authority is that of *Abingdon School District v. Schempp* (1963), 374 U.S. 203, 233, where the Court stated the purpose of the free exercise clause and the threshold requirements to the raising of a free exercise claim:

> (The purpose of the free exercise clause) ". . . is to secure religious liberty on the individual by prohibiting any invasions thereof by civil authority. Hence, it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."

The coercive effect upon appellants of the tax distribution system complained of can be seen in the following hypothetical case. Suppose two Pennsylvania families each sending two children through the 12 years of elementary-secondary schooling: Family A elects to use the State school system, Family B a school (Muslim, Jewish, Christian) as dictated by religious conviction. Each family pays $750 a year in ad valorem and sales taxes, or $8,000 over the 12 year span. But Family B, by so electing, must pay more *in order to exercise its religious freedom.* Since the non-state option will cost on the order of $1,000 per child per year, Family B could well spend $24,000 + $8,000 while Family A spends $8,000. This occurs solely

because the State excludes Family B from the fund by virtue of that family's exercise of religious choice. Thus the choice is not freely exercised. Is this not clearly "hampering" to Family B? In *Everson* the Court declared:

> "On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it, from receiving the benefits of public welfare legislation.*" (Emphasis supplied.) (p. 16)

Note at this point that all citizens are to benefit from "public welfare legislation." (In this case school bussing.) Following *Everson* a situation arose in the case of *Sherbert v. Verner,* 374 U.S. 398 (1963),[7] in which Adell Sherbert, a Seventh Day Adventist, was denied unemployment compensation benefits because of her discharge due to refusal to work on Saturdays. The South Carolina Supreme Court had held that the denial of benefits:

> ". . . places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

In reversing the South Carolina Court, Mr. Justice Brennan said for the Court:

---

[7] See appellants' analysis of the parallels between *Sherbert* and the instant case as developed at p. 24½ infra.

"The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. [p. 404]

It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. [p. 404]

In *Speiser v. Randall,* 357 U.S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment Freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. [p. 405]"

Can there be seen any basic distinction between the Seventh Day Adventist who is refused public funds because she won't work on Saturday and the Christian who is refused public funds to educate his child because he or she rejects state schooling? Both taxpayers pay into the fund in question. Both funds are expended for public welfare. Both taxpayers are denied participation because they are persuaded that their faith commitment demands of them conduct that varies in some particular from the customary or established pattern in society. Neither party offers a

threat to any public interest or to society at large by the particular right claimed. Hence, the argument from religious freedom requires review in its high position as a substantive federal question not heretofore considered by the Court. Brief mention must next be made of the prior cases which have been weighed by the Court.

Stare Decisis

This petition is not being made in ignorance of the manifold decisions of this Court that essentially hold that "public" monies cannot be used to subsidize "religious" causes.[8] However, it is that very formulation of Court-made law that contributes to the unconstitutional burden appellants carry and now complain of. And it is at this juncture that the prior "private school aid" cases are distinguished, for in none of them were involved:

1. A claim by taxpayer citizens to participate as of right in public welfare funds.

2. A claim that the state schools themselves inculcate religious values in their students.

As the Court pointed out in *Edelman*:

"Since we deal with a constitutional question we are less constrained by the principle of stare decisis than we are in other areas of the law."

At this juncture, then, appellants present to the Court a new question; not *whether* religion may be advanced by state action, but, rather *which* religion (humanism or some others) may receive state support, for the state has

---

[8] *Meek v. Pittenger; Lemon v. Kurtzman, supra.*

procedurally admitted that it sponsors religious values. Hence, the legal ground of argument is shifted so that the Court can now review the question of whether or not a true pluralism will guide the state in its educational policies toward its citizenry. Appellants advert to *Sherbert,* supra p. 409, where the Court noted:

> "Extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences and does not represent that involvement of religious with secular institutions which it is the object of the Establishment clause to forestall."

This quotation arises from the complex of arguments reviewed in *Sherbert* which are analogized to the instant case in the table of comparison that follows.

ARGUMENT BY APPELLEE (INVALIDATED)	*COROLLARY*	*HOLDING FOR APPELLANT*	*COROLLARY*
I The South Carolina Supreme Court held specifically that Appellants ineligibility infringed none of her Constitutional liberties because the construction of the statute made by the Employment Security Commission "*places no restriction upon the Appellants freedom of religion nor ...*	The present tax structure places no *restriction* upon plaintiffs freedom of religion nor does it impair them in the exercise of their rights with respect to the education of their children because they are free to choose either the public school system or their own private schools.	"If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect". p. 404	Plaintiffs ineligibility for direct disbursement of school tax funds derives solely from the practice of their religion in the educational process, but the pressure of such ineligibility upon plaintiffs to forego procuring Christian Education for their children is unmistakable.
II *...does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her own conscience*" 240 S.C. 286; 303-304, 125 S.E. 2nd, 737, 746. (p. 401) (emphasis supplied)	Matters plaintiffs complain of are only an indirect result of welfare legislation which is within the Commonwealths' competence to inact no criminal or civil sanctions directly compel plaintiffs to attend public schools or to remain away from the Christian School.	"Here not only is it apparent that appellants declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable". P. 404	Such pressure forces plaintiffs to choose between following precepts of their religion and forfeiting public welfare benefits on the one hand and abandoning one of the precepts of their religion in order to receive benefits of the taxing pattern on the other hand. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against Appellant for her Saturday worship" (p. 404)
III unemployment compensation benefits are not appellant's "right" but merely a "privilege" (p. 404)	Public education is not a right of the plaintiffs but is merely a privilege, therefore they are not entitled as a matter of right to participate in the public education fund.	"It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (p. 404) (See further comment by the Court on Speiser vs. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2L. Ed.2nd 1460 as it appears at pages 405-406 in Sherbert.)	The tax structure complained of places conditions upon plaintiffs receipt of benefits; those conditions are to submit their children to educational perspectives repugnant to their faith while requiring economic support from plaintiffs which directly reduces plaintiffs ability to exercise their freedom under *Pierce* to finance education consistent with their faith. That such conditions are infringements upon plaintiffs liberties of religion and expression is as obvious as the handicap imposed.
IV "The appellees suggest no more *than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work*". (p. 407)	Public Education is a compelling state interest in the furtherance of the public welfare, therefore, whatever infringement of plaintiffs constitutional rights may exist in the tax structures complained of is justified by the nature of the interest the Commonwealth has in procuring satisfactory education for its citizens	"It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area "only the gravest abuses, endangering paramount interests, give occasion for permissible limitations." (p. 406) Citing *Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 323 89 LEd. 430.*	Neither the Commonwealths undeniable interest in education, nor its recent history of solely supporting defendants (and similar) systems suffice to justify infringements in this highly sensitive constitutional area. Only the gravest abuses of religious freedom, endangering the paramount interests of the Commonwealth may give reason for permissible limitations. See *Pierce v. Society of Sisters 268 U.S. 510 (1925).*
V To extend benefits to Sabbatarians fosters the establishment of the Seventh Day Adventist religion (p. 409)	To grant plaintiffs the relief they pray for would amount to an "establishment" of the Christian faith in education through the receipt of Commonwealth funds by the plaintiffs	Extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences and does not represent that involvement of religious with secular institutions which it is the object of the Establishment clause to forestall (p. 409)	Extension of educational tax proceeds to the plaintiffs in common with parents of children in public schools would reflect nothing more than the governmental obligation of neutrality in the face of religious differences, and would not represent the quality of involvement by the state in religious matters which it is the object of the Establishment Clause to forestall.

CONCLUSION

Thus it is entirely appropriate that certiorari should issue and the decision of the Third Circuit be reviewed.

Respectfully submitted,
REX DOWNIE, JR.,
Attorney for Petitioners

Supreme Court, U. S.
FILED
JUL 18 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1977
No. 77-101

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors,

KARL CUNNINGHAM and JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM, DIANE MARIE CUNNINGHAM and KAREN KAY CUNNINGHAM, minors,

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors,

JOHN H. WHITE and NORMA WHITE, his wife, suing in their own right and as parents and natural guardians of NATALIE WHITE and STEPHANIE WHITE, minors,

WILLIAM VISS and CHARLOTTE VISS, his wife, suing in their own right and as parents and natural guardians of STANLEY VISS, CAROL VISS and JONATHAN VISS, minors,

Petitioners

vs.

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRAEL PACKELL, Attorney General; of the Commonwealth of Pennsylvania

and

HAROLD MARTIN, STEVEN RHODES, ROBERT VEON, HARRY FRY, RONALD STURM, PETER DeCARO, BOB HAGEN, JOHN RUKAS and DOM CASEY and their successors in office, Directors of Big Beaver Falls Area School District

and

LeROY STEWART, ROBERT CAUGHNER, DAVID GROPP, AMELIA FUSCO, ROBERT AMALIA, ROBERT BERNHARDY, WILLIAM LIEBERMAN, WILLIAM G. DANNELS and BILLIE WALLACE and their successors in office, Directors of Blackhawk School District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

REX DOWNIE, JR.,
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TABLE OF CONTENTS

	Page
Docket Entries	1a
Complaint in Equity for Injunctive and Declaratory Relief	3a
Petition for Leave To Amend Complaint	15a
Order	19a
Order of Court, April 23, 1976	20a
Motion To Dismiss of Defendants John C. Pittenger, Secretary of Education; Grace Sloan, Treasurer; Israel Packel, Attorney General; of the Commonwealth of Pennsylvania	21a
Motion To Dismiss of Defendants Big Beaver Falls School Directors and Blackhawk School Directors	24a
Opinion, Court of Appeals	27a
Concurring Opinion	31a
Judgment, Court of Appeals	33a
Opinion of District Court in Prior Suit	35a
Order	47a
Statutes Involved:	
24 Purdon's Statutes:	
Section 2--213	48a
Section 6--602	48a
Section 6--610	48a
Section 6--652	49a
Section 6--674	52a
Section 6--679	52a
Section 6--680	53a
Section 6--686	55a

APPENDIX.
Docket Entries.

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PLAINTIFFS

DaVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN & EDWINA MIRIAM MOXLEY, minors

KARL CUNNINGHAM & JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM & KAREN KAY CUNNINGHAM, minors

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors

JOHN H. WHITE & NORMA WHITE, his wife, suing in their own right and as parents & natural guardians of NATALIE WHITE & STEPHANIE WHITE, minors

WILLIAM VISS & CHARLOTTE VISS, his wife, suing in their own right and as parents & natural guardians of STANLEY VISS, CAROL VISS & JONATHAN VISS, minors

DEFENDANTS

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRA PACKEL, Attorney General; Commonwe of Pa; and

HAROLD MARTIN, STEVEN RHODES, ROBE VEON, HARRY FRY, RONALD STRUM, PET DECARD, BOB HAGEN, JOHN RUKAS & DO CASEY and their successors in offi DIRECTORS OF BIG BEAVER FALLS AREA SCHOOL DISTRICT and

LEROY STEWART, ROBERT CAUGHNER, DA GROPP, AMELIA FUSCO, ROBERT AMALIA ROBERT BERNHARDY, WILLIAM LIEBERMA WILLIAM G. DANIELS & BILLIE WALLA and their sucessors in office, DIR OF BLACKHAWK SCHOOL DISTRICT

Related to C.A. 73-921

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Docket Entries.

C.A. 75-1389

1975	No.	PROCEEDINGS
Oct. 30	1	Complaint in Equity for Injunctive & Declaratory Relief with demand for Three Judge Court.
Oct. 30		Summons issued.
Nov. 13	2	Summons returned executed 11/5/75 on John Pittenger, Grace Sloan, Israel Packel, on 11/4/75 on Director of Big Beaver Falls School District, & Directors of Black School District.
Nov. 17	3	Motion to dismiss and proposed order filed by Big Beaver Falls Area School Directors and Blackhawk School Directors.
Nov. 18	4	Entry of Appearnce of J. Justin BlewittJr, Lawrence Silver &Robert Kane as counsel Defts Pittenger, Sloan & Packel
Nov. 21	5	Stipulation for extension of time for defts Pittenger, Sloan and Packel to answer and proposed order filed.
Nov. 21	m/5	Order of Court entered upon Stip filed directingthat Defts have to 12/9/75 to answer to Pltf's Complaint (Miller,J.).
Dec. 9	6	Motion to dismiss of defts. John C. Pittenger, Secretary of Education, Grace Sloan, Treasurer, Israel Packel, Atty. Gen. of the Comm. of Pa. filed.
Dec. 22	7	Entry of Appearance of David Max Baer as counsel for Defts Pittenger, Sloan, & Packel filed.
1976 Jan. 14	8	Praecipe for Appearance of John H. Duff & Robert P. Kane as counsel for Defts Pittenger, Sloan & Packel filed.
Jan. 28	9	Motion to dismiss argument on motions to dismiss and proposed order filed by pltfs.
Feb. 17	10	Notice to Counsel advising that time for argument on Mtns to Dismiss is set for 3/1/76 at 2:00 before Miller,J.
Feb. 27	11	Motion to continue arguments set for March First filed and Order entered direct that the matter is continued pending further order of Court (Miller,J.).
Mar. 8	12	Notice to counsel advising that argument on Mtn to Dismiss is set for 4/6/76 at 2:00 before Miller,J. filed.
Mar. 29	13	Certificate of notice, petition for leave to amend complaint and proposed order filed by pltfs.
Mar. 30	m/13	Order of Court entered 3/29/76 upon Petition to Amend filed directing that complaint is amended as to the allegations stated (Miller,J.).
Apr. 6	14	Hearing on Mtn to Dismiss held before Miller,J. Rep.M. Himless Memo filed.
April 23	15	Opinion filed re: Defts' Mtn to Dismiss (Miller,J.).
April 23	16	Order of Court entered directing that Deft s'Mtn to dismissis hereby granted (Miller,J.).
April 23		Pursuant to Opinion filed and Order entered, case is hereby dismissed Bernhard Schaffler,Clerk
April 23		Notices mailed.
May 21	17	Notice of Appeal filed. by Pltf.
May 21		Copy of Notice mailed to U.S. Court of Appeals, Counsel, & Given to Judge
May 24		$250.00 Appeal Bond filed (Fidelity & Deposit of Maryland)
June 15		Origina Record mailed to U.S. Court ofAppeals.

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Complaint in Equity for Injunctive and Declaratory Relief.

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors

KARL CUNNINGHAM and JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM, DIANE MARIE CUNNINGHAM and KAREN KAY CUNNINGHAM, minors

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors

JOHN H. WHITE and NORMA WHITE, his wife, suing in their own right and as parents and natural guardians of NATALIE WHITE and STEPHANIE WHITE, minors

WILLIAM VISS and CHARLOTTE VISS, his wife, suing in their own right and as parents and natural guardians of STANLEY VISS, CAROL VISS and JONATHAN VISS, minors,

Plaintiffs

vs.

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRAEL PACKEL, Attorney General; of the Commonwealth of Pennsylvania

and

HAROLD MARTIN, STEVEN RHODES, ROBERT VEON, HARRY FRY, RONALD STURM, PETER DeCARO, BOB HAGEN, JOHN RUKAS and DOM CASEY and their successors in office. DIRECTORS OF BIG BEAVER FALLS AREA SCHOOL DISTRICT

filed Oct 30, 1975

CA 75- 1389

ACTION IN EQUITY

ACTION FOR DECLARATORY JUDGMENT

(Filed October 30, 1975.)

and

LeROY STEWART, ROBERT CAUGHNER,
DAVID GROPP, AMELIA FUSCO, ROBERT
AMALIA, ROBERT BERNHARDY, WILLIAM LIEBERMAN,
WILLIAM G. DANNELS and BILLIE WALLACE
and their successors in office.
DIRECTORS OF BLACKHAWK
SCHOOL DISTRICT

COMPLAINT IN EQUITY FOR INJUNCTIVE
AND
DECLARATORY RELIEF

TO THE HONORABLE THE JUDGES OF SAID COURT:

COMES NOW the above named plaintiffs by their Attorney REX DOMNIE,JR.,ESQ., and pray Your Honorable Court to appoint a three Judge Court pursuant to 28 USCA Section 2281 et seq. for the purpose of hearing and trial on the ensuing allegations and granting of the injunctive and declaratory relief prayed for hereafter. For their cause of action your plaintiffs state as follows:

1. Your plaintiffs DAVID J. ALLEN and VIRETTA MAE ALLEN are adult individuals, citizens of the United States and residents of the Commonwealth of Pennsylvania and make their residence at Midvale Road, Big Beaver Township, Beaver Falls, Beaver County, Pennsylvania, suing in their own right and as parents and natural guardians of their minor children LEASHA MAE MOXLEY who is a student in the 5th grade, TAMELL ESTELLE MOXLEY who is a student in the 9th grade, WANDA GAYLE ALLEN who is a student in the 10th grade, all at Beaver County Christian School, New Brighton, Beaver County, Pennsylvania.

2. Your plaintiffs KARL CUNNINGHAM and JOAN CUNNINGHAM are adult individuals, citizens of the United States and residents of the Commonwealth of Pennsylvania and make their residence at 2832-5th Avenue, Beaver Falls, Beaver County, Pennsylvania. They sue herein in their own right and as parents and natural guardians of their minor children as follows: DIANE MARIE CUNNINGHAM who is in the 11th grade at the Beaver County Christian School and KAREN KAY CUNNINGHAM who is in the 10th grade at the Beaver County Christian School.

3. Your plaintiffs [redacted] and PHYLLIS MOORE are adult individuals, citizens of the United States and residents of the Commonwealth of Pennsylvania, residing at 4519-5th Avenue, Beaver Falls, Beaver County, Pennsylvania, suing in their own right and as parents and natural guardians of their minor child LINDA JANE MOORE who attends the 7th grade at the Beaver County Christian School.

4. Your plaintiffs JOHN H. WHITE and NORMA WHITE are adult individuals, citizens of the United States and residents of the Commonwealth of Pennsylvania, making their residence in Darlington, Beaver County, Pennsylvania, and are the parents and natural guardians of their minor children NATALIE WHITE and STEPHANIE WHITE. NATALIE WHITE is enrolled as a first grade student at Beaver County Christian School.

5. Your plaintiffs WILLIAM VISS and CHARLOTTE VISS, his wife, are adult individuals, citizens of the United States of America and residents of the Commonwealth of Pennsylvania, making their residence at Dogwood Drive, Beaver Falls, Beaver County, Pennsylvania and are the parents and natural guardians of CAROL VISS who is in the 8th grade at the Beaver County Christian School and JONATHAN VISS who is in the 5th grade at the Beaver County Christian School.

6. Defendants HAROLD MARTIN, STEVEN RHODES, ROBERT VRON, HARRY FRY, RONALD STURM, PETER DeCARO,BOB HAGEN, JOHN RUKAS and DON CASEY are elected Directors of BIG BEAVER FALLS AREA SCHOOL DISTRICT which is a School District operated under the laws of the Commonwealth of Pennsylvania and which has its principal office at Carnegie Library Building, 7th Avenue and 13th Street, Beaver Falls, Beaver County, Pennsylvania.

7. Defendants LeROY STEWART, ROBERT CAUGHNER, DAVID GROPP, AMELIA FUSCO, ROBERT AMALIA, ROBERT BERNHARDY, WILLIAM LIEBERMAN, WILLIAM G. DANNELS and BILLIE WALLACE are elected Directors of BLACKHAWK SCHOOL DISTRICT operated under the laws of the Commonwealth of Pennsylvania and which has its principal office at 701 Darlington Road, Beaver Falls, Beaver County, Pennsylvania.

8. That the above named School Districts are those in which your respective plaintiffs reside, and said Districts own, operate and maintain, under the direction of the named defendants, in part by compulsory taxation upon your plaintiffs, the school systems within said districts.

9. That BEAVER COUNTY CHRISTIAN SCHOOL is a school open to all members of the public who agree with its goals and philosophy. Said school is governed by a Parental Association and Board and is legally established as a non profit corporation under the Laws of the Commonwealth of Pennsylvania.

10. That Your Honorable Court has jurisdiction of the foregoing Complaint under the following statutory provisions: 28 U.S.C. 1331 et seq; 28 U.S.C. 2201 et seq. (as to Declaratory Relief) and 28 U.S.C. 1343 (3), (4), as amended. Jurisdiction lies under these provisions in that plaintiffs herein aver abridgement of their rights,privileges and immunities rising under Amendments I and XIV of the United States Constitution by the conduct of defendants herein under color of laws of the Commonwealth of Pennsylvania as set forth in Paragraphs 17 -26 following.

11. That the Constitution of the Commonwealth of Pennsylvania Article III Section B-15 provides:

> PUBLIC SCHOOL MONEY NOT AVAILABLE TO SECTARIAN SCHOOLS
> Section 15. No money raised for the support of the Public Schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

12. That the named defendant School Directors by the School Code of 1949 as amended 24 Purdons Statutes Section 1-101et seq. through power granted them by Legislation have the power to assess the real and personal property of your plaintiffs, levy a tax based on said assessment, and compel payment of said tax under compulsion of lien and public sale. See 24 Purdons Statutes Section 2-213, 6-602, 6-603, 6-610, 6-652, 6-674, 6-679, 6-680 and 6-686.

13. That subject to said taxing power your defendants have paid taxes in violation of their religious conscience and convictions, subject to the compulsion alleged above, to the respective districts as set forth below:

PLAINTIFFS	SCHOOL DISTRICT	1973 SCHOOL TAX	1974-5 SCHOOL TAX
Plaintiffs ALLEN	BLACKHAWK	$129.04	$142.86
Plaintiffs CUNNINGHAM	BIG BEAVER FALLS	$529.73	$221.70
Plaintiffs MOORE	BIG BEAVER FALLS	$321.18	$381.28
Plaintiffs VISS	BLACKHAWK	$465.95	$493.01
Plaintiffs WHITE	BLACKHAWK	$397.87	$462.00

14. That under compulsion of the Pennsylvania Sales and Use Tax 72 Purdons Statutes 3402-801 et seq., your plaintiffs are compelled to pay six percent (6%) of the purchase price of certain purchased goods and services to the Office of the Treasury Commonwealth of Pennsylvania, said tax being applied by said Office for educational funding to the exclusion of your plaintiffs.

15. That the proceeds of said Sales and Use Tax are applied exclusively by the Office of the State Treasurer and the Department of Education to support the operations of the defendants School Districts as well as other similar districts within the Commonwealth, subject to the constitutional strictures alleged above in Paragraph eleven.

16. That plaintiffs CUNNINGHAM, MOORE, WHITE, ALLEN and VISS are members of the BEAVER COUNTY CHRISTIAN SCHOOL ASSOCIATION through which Association they pay for the Education of their own children and the children of their community by means of payment of contributions and tuition costs. Said payments and contributions are set forth as follows:

PLAINTIFFS	TUITION PAYMENTS FOR 1974-1975	CONTRIBUTIONS FOR 1974-1975
Plaintiffs CUNNINGHAM	$ 814.00	$ 100.00
Plaintiffs MOORE	$ 540.00	$ 110.00
Plaintiffs WHITE	$ 540.00	$ 350.00
Plaintiffs VISS	$1,045.00	$1,600.00
Plaintiffs ALLEN	$ 972.12	$ 100.00

17. That all of your plaintiffs are of the Christian faith and in obedience to their Christian beliefs are commanded to "raise their children in the nurture and admonition of the Lord". Your plaintiffs perceive and believe this command to encompass the totality of the upbringing of their children including the formal educational process.

18. That your plaintiffs consider themselves bound by their Christian faith to support Christian Education as specified above; provide for the attendance of their children at said schools and to undertake the obligation to support and maintain said schools in all respects that are necessary to the operation and maintenance of said schools.

19. Your plaintiffs aver that their Christian faith provides for them and impels them to a world and life view resting upon a Christian philosophy of life, so that no truth, teaching, fact, or educational philosophy can be neutral or value-free in their eyes.

20. Plaintiffs aver that as a matter of fact and as well in the light of their own religious perspective, the various educational institutions, course materials, text books, curricula, educational policies and practices; all procedures and practices employed by the named defendants in the operation of their various educational institutions at whatever level, are, to an extent unacceptable in your plaintiffs dominated by the religious philosophy of secularism a/k/a secular humanism in certain subsidiary forms including but not limited to existentialism, pragmatism, empiricism, relativism, positivism and evolutionism.

21. Your plaintiffs will show at trial by evidence including but not limited to the following that the educational process as maintained by the named defendants is hostile to and diametrically opposed to the Christian world and life view maintained by your plaintiffs through the Christian educational establishment designated above. The following is set forth to better apprise the Court and the parties defendant of the evidentiary basis for the allegations following:

EDUCATIONAL AREA	CHRISTIAN PERSPECTIVE	HUMANIST - SECULAR PERSPECTIVE
ANTHROPOLOGY	Man is created in God's image; A cultural former responsible to God with an eternal future under God.	Man is a thinking animal; responsible only to self or state in society with no future after death.
NATURE OF BEING OR EXISTENCE. (ONTOLOGY)	All that "is" is sustained and held in being by the power of Gods Word, i.e. The Messiah	All that "is" is the outworking of random collisions of matter in a chaotic cosmos or of natural laws innate to man and nature.
NATURE OF KNOWLEDGE (EPISTEMOLOGY)	Knowledge is: Fundamentally 1. A relationship with God; 2. What comes from God via The Scriptures and Creation	Knowledge is only a process of rational or empirical inquiry, or is innate to man's feelings, conscience or reason.
HUMAN GOALS OR DESTINY (TELEOLOGY)	Ultimate goal is to love God by loving one's neighbor as one's self - looking forward to the new heaven and earth	Ultimate goal is to glorify man through the state or individual self service.
ETHICS	Faithfullness to God which commands faithfulness to others; ethical relationships pervade all human interactions.	No certain standards; ethics are dictated by a changing social context or else are totally relative.
TRUTH	All truth comes from God through the Messiah and the Scriptures; is therefore sure, certain.	All "truth" is relative, or derived by science, held in suspension; or is unknowable in an absurd cosmos.
SCIENCE	Man's abstraction of God's ruling norms from the coherence of creation.	Man's application of rules to a chaotic universe or discovery of natural laws inherent in the universe.

22. The Secular Humanism promulgated under the auspices of the named defendants further closes the state schools to your plaintiffs for the following causes:

a. By asserting values which conflict with those imparted through plaintiffs church and home instruction.

b. By teaching as truth views of man, creation and human purpose which conflict with and tend to undermine the Christian values imparted by plaintiffs Church and home instruction.

c. By alloting to the promotion of items referred to under (a) and (b) above approximately thirty-five (35) hours per week as over against weekend and evening hours remaining to your plaintiffs for the instruction of their children.

That by reason of the contrasting and opposing values that exist between Christianity and the humanistic values of the named defendants educational systems, said "public" schools as operated by the named defendants are religiously, philosophically, morally and ethically closed to your plaintiffs. Certain of your plaintiffs have been able to provide for Christian Education for their children, and are forced by the strictures of the taxing system as alleged above to support the public educational system as well as pay tuition for their own children; such plaintiffs aver that payment of the public school tax by them violates their religious convictions and is repugnant to their consciences in that they are being taxed to support an educational system which is destructive of the Christian faith of those members of the Christian community that are compelled to submit themselves to it by reason of the absence of an economically equitable alternative.

23. That the educational establishments operated by the named defendants are not neutral or non-sectarian, but to the contrary teach religious points of view; positions, views of life, purposes for human existence, which conflict with or are hostile to in varying degrees the views held by your plaintiffs in the light of their Christian belief and faith.

24. That none of the taxes levied as alleged in Paragraphs 12 through 15 above are distributed to your plaintiffs or to the Beaver County Christian School which the plaintiffs children attend. That the levy of taxes upon your plaintiffs as described in Paragraphs 12through 15 above violate the religious consciences of your plaintiffs in that by the same they are being compelled to support and promote a religious faith hostile to their own and said violation of their religious faith and consciences will continue so long as no equitable distribution of the school tax fund is made.

25. That the conditions alleged above including the provision of the Pennsylvania Constitution referred to exist in violation of your plaintiffs rights as citizens of the United States of America under the 1st Amendment to the Unidted States Constitution and under the 14th Amendment to the United States Constitution in that the laws and practices alleged constitute an impairment of the free exercise of your plaintiffs' religious faith and further constitute an establishment of the religion of secular humanism by the governmental officials named above, in the following particulars:

a. That your plaintiffs are deprived of the use of public welfare school tax funds for the education of their children by reason of discrimination based on their Christian faith.

b. That your plaintiffs are thereby forced to choose between either:

1. Accepting "public"school education in order to avail themselves of said public welfare school tax funds, in violation of their religious convictions on the one-hand, or:

2. Maintaining their religious faith by foregoing their rightful share in said public tax monies and purchasing education at added cost while still paying public school tax on the other, in violation of the same religious convictions.

c. That your plaintiffs are being taxes to support the propagation of the faith of secular humanism which is repugnant and antithetical to them as Christians thus compelling them to support said religion of secular humanism contrary to their will or consent.

d. That the pattern of taxation of plaintiffs by the named defendants as alleged herein therefore imposes an unconstitutional handicap, hindrance and economic condition upon the exercise of plaintiffs Christian religious beliefs by impairing the freedom of your plaintiffs to exercise their religious freedom in the education of their children.

26. By reason of the matters set forth above plaintiffs aver that the taxing laws and policies enforced by the defendants named constitute an unconstitutional, continuing and onerous economic burden on your plaintiffs; an unconstitutional, immediate pressing and irreparable impairment of the free exercise of your plaintiffs Christian faith in education; and an unconstitutional, immediate pressing and irreparable impairment of the parental rights of your plaintiffs to freely direct the full upbringing of their children and the children of their community in the world and life philosophy of their religion.

27. That all of the wrongs complained of herein are immediate and continuing.

WHEREFORE your plaintiffs pray Your Honorable Court to:

a. Declare the named school tax laws to be unconstitutional as to your plaintiffs;

b. Declare the Pennsylvania Constitution Article 3 Section 8-15 unconstitutional insofar as it may be regarded to constitute a barrier to the distribution of educational tax funds to or on behalf of your plaintiffs for the education of their children and the children of their community in the school set forth in Paragraph 9.

c. To direct the named defendants to put into effect with all deliberate speed an equitable and just plan for distribution of public school tax monies so that plaintiffs children will enjoy the use of school tax funds on a per capita footing equal with all other students of the Commonwealth without reference to religion.

d. To enjoin all further taxation of your plaintiffs pending

effectuation of relief prayed for above, or, in the alternative, to direct your plaintiffs to pay their proper school tax funds into an escrow account to be held by Your Honorable Court pending adjudication of this matter.

e. To grant such other relief as may be equitable and just under the circumstances.

Respectfully submitted,

Rex Downie

REX DOWNIE, JR., ESQ.
Attorney for Plaintiffs

Complaint in Equity for Injunctive and Declaratory Relief.

A F F I D A V I T

COMMONWEALTH OF PENNSYLVANIA

SS:

COUNTY OF BEAVER

Before me, a Notary Public, in and for the County of Beaver and Commonwealth of Pennsylvania, personally appeared one known to me or satisfactorily identified to me as KARL CUNNINGHAM, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and belief.

KARL CUNNINGHAM

Sworn to and subscribed before me this 27th day of October, 1975.

NOTARY PUBLIC

LORRAINE CAPO, Notary Public
Beaver Falls, Beaver Co., Pa.
My Commission Expires July 19, 1976

Petition for Leave to Amend Complaint.

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID J. ALLEN et ux., et al	:	
Plaintiffs	:	CA 75-1389
Vs.	:	ACTION IN EQUITY
JOHN C. PITTENGER et al	:	ACTION FOR DECLARATORY JUDGMENT
Defendants	:	(Filed March 29, 1976.)

PETITION FOR LEAVE TO AMEND COMPLAINT

TO THE HONORABLE THE JUDGES OF SAID COURT:

NOW COME PLAINTIFFS as captioned and move Your Honorable Court to grant leave to Plaintiffs to amend their Complaint to include the following allegations:

28. That John C. Pittenger is named as a party defendant. The said John C. Pittenger is Secretary of Education of the Commonwealth of Pennsylvania and in that capacity develops, promotes and implements the curricular materials complained of in paragraphs 20, 21, 22 and 23 above.

29. That Grace Sloan acting as Secretary of the Treasury of the Commonwealth of Pennsylvania is named as a defendant herein. In that capacity she directs and implements disbursement of funds as is complained of in paragraphs 14 and 15 above.

30. That Robert Kane, acting as Attorney General of the Commonwealth of Pennsylvania is named as a party defendant herein. In that capacity he is charged with enforcement of the statutes set forth in paragraphs 14 and 15 above and the terms of the Constitution of the Commonwealth of Pennsylvania as alleged in paragraph 11 above.

This request is made for the reason that said allegations

Petition for Leave to Amend Complaint.

were omitted from the original Complaint through oversight of counsel.

Respectfully submitted:

REX DOWNIE, JR., ESQ.
Attorney for Plaintiffs

Petition for Leave to Amend Complaint.

Filed March 29, 1976

A F F I D A V I T

COMMONWEALTH OF PENNSYLVANIA
SS:
COUNTY OF BEAVER

Before me a Notary Public in and for the County of Beaver and Commonwealth of Pennsylvania, personally appeared KARL CUNNINGHAM, who, being duly sworn according to law, deposes and says that the facts contained in the foregoing Petition for Leave to Amend Complaint are true and correct to the best of his knowledge, information and belief.

KARL CUNNINGHAM

Sworn to and subscribed before me this 26th day of March, 1976.

NOTARY PUBLIC

LORRAINE CAPO, Notary Public
Beaver Falls, Beaver Co., Pa.
My Commission Expires July 19, 1976

Petition for Leave to Amend Complaint.

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID J. ALLEN et ux., et al	:	
Plaintiffs	:	CA 75-1389
Vs.	:	ACTION IN EQUITY
JOHN C. PITTENGER et al	:	ACTION FOR DECLARATORY JUDGMENT
Defendants	:	

ORDER

AND NOW, to wit, this _____ day of _____, 1976, upon consideration of the foregoing motion it is ordered and directed that _____

_____

_____

_____

_____

_____

BY THE COURT:

_____ J.

Order.

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID J. ALLEN et ux., et al	:	(Filed March 30, 1976.)
Plaintiffs	:	CA 75-1389
Vs.	:	ACTION IN EQUITY
JOHN C. PITTENGER et al	:	ACTION FOR DECLARATORY JUDGMENT
Defendants	:	

filed March 30, 1976

ORDER

AND NOW, to wit, this 29th day of March, 1976, upon consideration of the foregoing motion it is ordered and directed that upon consideration of the foregoing, it is ORDERED and DIRECTED that the foregoing Amendment to the Complaint be filed.

BY THE COURT:

_____ J.

Order of Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors, ET AL., Plaintiffs

v.

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRAEL PACKEL, Attorney General; of the Commonwealth of Pennsylvania, ET AL., Defendants.

Civil Action No. 75-1389

(Filed April 23, 1976.)

ORDER OF COURT

AND NOW, to-wit, this 23 day of April, 1976, it is hereby ORDERED and DIRECTED that the motions to dismiss filed by the defendants be and the same hereby are granted.

United States District Judge

cc: Rex Downie, Jr., Esq.
714 Fourteenth Street
Beaver Falls, Pennsylvania 15010

David Max Baer, Esq.
Deputy Attorney General
Department of Justice
State Capitol Annex Building
Harrisburg, Pennsylvania 17120

Frank C. Lewis, Esq.
Hudacsek & Lewis
1126 Sixth Avenue
Beaver Falls, Pennsylvania 15010

E. Y. Calvin, Esq.
717 Twelfth Street
Beaver Falls, Pennsylvania 15010

Motion to Dismiss of Defendants John C. Pittenger, Secretary of Education; Grace Sloan, Treasurer; Israel Packel, Attorney General; of the Commonwealth of Pennsylvania.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Filed December 9, 1975.)

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors

KARL CUNNINGHAM and JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM, DIANE MARIE CUNNINGHAM and KAREN KAY CUNNINGHAM, minors

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors

JOHN H. WHITE and NORMA WHITE, his wife, suing in their own right and as parents and natural guardians of NATALIE WHITE and STEPHANIE WHITE, minors

WILLIAM VISS and CHARLOTTE VISS, his wife, suing in their own right and as parents and natural guardians of STANLEY VISS, CAROL VISS and JONATHAN VISS, minors, Plaintiffs

v.

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRAEL PACKEL, Attorney General; of the Commonwealth of Pennsylvania

and

HAROLD MARTIN, STEVEN RHODES, ROBERT VEON, HARRY FRY, RONALD STURM, PETER DeCARO, BOB HAGEN, JOHN RUKAS and DOM CASEY and their successors in office. Directors of Big Beaver Falls Area School District

and

LeROY STEWART, ROBERT CAUGHNER, DAVID GROPP, AMELIA FUSCO, ROBERT

C.A. 75-1389

ACTION IN EQUITY

ACTION FOR DECLARATORY JUDGMENT

AMALIA, ROBERT BERNHARDY, WILLIAM LIEBERMAN,
WILLIAM G. DANNELS and BILLIE WALLACE :
and their successors in office.
Directors of Blackhawk School District :

MOTION TO DISMISS OF DEFENDANTS JOHN C. PITTENGER, SECRETARY OF EDUCATION; GRACE SLOAN, TREASURER; ISRAEL PACKEL, ATTORNEY GENERAL; OF THE COMMONWEALTH OF PENNSYLVANIA

AND NOW, this 9th day of December, 1975, defendants, John C. Pittenger, Secretary of Education; Grace Sloan, Treasurer; Israel Packel, Attorney General; of the Commonwealth of Pennsylvania, by their Attorneys, J. Justin Blewitt, Jr., Deputy Attorney General, David Max Baer, Deputy Attorney General, and Lawrence Silver, Deputy Attorney General, respectfully move this Court to dismiss the Complaint for the following reasons:

1. The Complaint fails to contain any statement of a claim for relief against defendants John C. Pittenger, Secretary of Education, Grace Sloan, Treasurer; and/or Israel Packel, Attorney General; of the Commonwealth of Pennsylvania, as mandated by Rule 8(A) of the Federal Rules of Civil Procedure.

2. This Complaint is barred by the doctrines of res judicata and collateral estoppel by virtue of this Court's Order and Opinion in Allen et al. v. Blackhawk School District et al., C. A. No. 73-921, Opinion filed: September 24, 1975, which was affirmed by the Third Circuit Court of Appeals, 515 F.2d 506 (1975).

3. The Complaint fails to state a claim upon which relief can be granted.

4. This Court lacks jurisdiction over the subject matter.

5. The claim is barred by the Eleventh Amendment to the Constitution of the United States of America.

6. The defendants John C. Pittenger, Secretary of Education; Grace Sloan, Treasurer; and Israel Packel, Attorney General; of the Commonwealth of Pennsylvania are immune from suit under the doctrine of sovereign immunity.

Respectfully submitted,

J. Justin Blewitt, Jr.
Deputy Attorney General

David Max Baer
Deputy Attorney General

Lawrence Silver
Deputy Attorney General
Chief, Civil Litigation

Attorneys for Defendants,
John C. Pittenger, Secretary of Education;
Grace Sloan, Treasurer;
Israel Packel, Attorney General;
of the Commonwealth of Pennsylvania

Department of Justice
Capitol Annex
Harrisburg, PA 17120

(717)787-7113

(Caption Omitted) Filed Nov. 17, 1976

MOTION TO DISMISS

The defendants Big Beaver Falls Area School Directors and Blackhawk School Directors by their solicitors, Frank C. Lewis, Esquire and E. Y. Calvin, Esquire move the Court as follows:

1. To dismiss this action because all of the matters complained of in this case were previously decided in an action brought by plaintiffs against the defendant school districts for the same cause of action as that upon which this action is based, in this same United States District Court, Civil Action No. 73-921, in which action a judgment was entered for defendants on September 25, 1974, by Judge John L. Miller, dismissing said Complaint, which judgment was subsequently affirmed by the United States Court of Appeals for the Third Circuit at No. 74-2218.

2. To dismiss this action because the Complaint shows clearly that the Commonwealth of Pennsylvania is an indispensable party to this proceeding without which no relief could be granted to plaintiffs and plaintiffs have failed to name said Commonwealth as a party defendant, evidently in an attempt to avoid the doctrine of Sovereign Immunity.

3. To dismiss this action because the relief sought is barred under the provisions of 28 U.S.C.A., Section 1341, which expressly forbid such relief to plaintiffs.

4. To dismiss the above entitled action because the complaint fails to state a claim against defendants upon which relief can be granted.

5. To dismiss the above entitled action because the matter in controversy does not involve any Federal question under the Constitution of the United States.

6. To dismiss the above entitled action because it appears in said Complaint that the defendants are school directors and as such are only agents of the Commonwealth of Pennsylvania and that the entire process and operation of defendants' educational system is prescribed, promulgated, approved and controlled by legislation of the Commonwealth and by guide lines issued by the Department of Education of the Commonwealth. The defendant school directors are therefore without power or authority to grant relief to the plaintiffs as prayed for in their complaint because any such relief must come, if granted by the Court, through and from the Commonwealth of Pennsylvania by legislative action.

7. To dismiss the plaintiffs' action because the relief sought by plaintiffs is expressly forbidden by the provisions of Article III, Section 15, of the Constitution of Pennsylvania as set forth in said Complaint, and no such relief could be granted to plaintiffs unless said Constitution was amended to authorize such relief to plaintiffs. Such accomplishment could only be secured by legislative enactment approved by a majority vote of the people of this Commonwealth. No such power or authority to order such an amendment has been vested in this Court.

8. To dismiss this action because the Complaint fails to contain "a short and plain statement of the grounds upon which the Court's jurisdiction depends" as mandated by Rule 8 (A) of the Federal Rules of Civil Procedure.

9. To dismiss this complaint because this Court lacks jurisdcition over the subject matter.

10. To dismiss the plaintiffs' Complaint because the claim is barred by the 11th Amendment to the Constitution of the United States of America.

11. To dismiss the plaintiffs' complaint because the defendants are immune from such suit under the doctrine of Sovereign Immunity.

Respectfully submitted,

(s) Frank C. Lewis
Frank C. Lewis, Esquire
Attorney for Big Beaver Falls Area School Board Members

(s) E. Y. Calvin, Esq.
E. Y. Calvin, Esquire
Attorney for Blackhawk School Board Members

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

- - -

No. 76-1839

- - -

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors

KARL CUNNINGHAM and JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM, DIANE MARIE CUNNINGHAM and KAREN KAY CUNNINGHAM, minors

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors

JOHN H. WHITE and NORMA WHITE, his wife, suing in their own right and as parents and natural guardians of NATALIE WHITE and STEPHANIE WHITE, minors

WILLIAM VISS and CHARLOTTE VISS, his wife, suing in their own right and as parents and natural guardians of STANLEY VISS, CAROL VISS and JONATHAN VISS, minors,

Appellants,

v.

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRAEL PACKEL, Attorney General; of the Commonwealth of Pennsylvania

and

HAROLD MARTIN, STEVEN RHODES, ROBERT VEON, HARRY FRY, RONALD STURM, PETER DeCARO, BOB HAGEN, JOHN RUKAS and DOM CASEY and their successors in office.
DIRECTORS OF BIG BEAVER FALLS AREA SCHOOL DISTRICT

and

LeROY STEWART, ROBERT CAUGHNER, DAVID GROPP, AMELIA FUSCO, ROBERT AMALIA, ROBERT BERNHARDY, WILLIAM LIEBERMAN, WILLIAM G. DANNELS and BILLIE WALLACE and their successors in office.
DIRECTORS OF BLACKHAWK SCHOOL DISTRICT

- - -

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 75-1389)

- - -

Submitted Under Third Circuit Rule 12(6)
February 18, 1977
Before: ALDISERT and GARTH, Circuit Judges, and
STAPLETON, District Judge *

---

* Honorable Walter K. Stapleton, of the United States District Court for the District of Delaware, sitting by designation.

Rex Downie, Jr., Esq.
714 14th Street
Beaver Falls, Pennsylvania 15010

COUNSEL FOR APPELLANTS

E. Y. Calvin, Esq.
COUNSEL FOR LeROY STEWART, et al.

F. C. Lewis, Esq.
COUNSEL FOR HAROLD MARTIN, et al.

1126 6th Avenue
Beaver Falls, Pennsylvania 15010

David Max Baer,
Deputy Attorney General

J. Justin Blewitt, Jr.,
Deputy Attorney General
Chief of Civil Litigation

Robert P. Kane,
Attorney General
State Capitol Annex
Harrisburg, Pennsylvania 17120

COUNSEL FOR JOHN C. PITTENGER, et al.

- - -

OPINION OF THE COURT

(Filed April 19, , 1977)

PER CURIAM

Plaintiffs are Pennsylvania taxpayers seeking declaratory and injunctive relief against the state's school tax system on the ground that the system violates the religious clauses of the First Amendment to the United States Constitution. They seek, inter alia, an "equitable and just plan for distribution of public school tax monies so that plaintiffs' children will enjoy the use of school tax funds on a per capita footing equal with all other students of the Commonwealth without reference to religion." The complaint names as defendants several individual officers of the state, including the Secretary of Education.

Plaintiffs filed a previous action in 1973 which was identical to the present action in every respect except that the 1973 action named as defendants the Blackhawk and Big Beaver Falls Area School Districts, and the Commonwealth of Pennsylvania. Faced with a threshold defense of sovereign immunity, the trial court in the previous case ruled that the claim was in essence and effect a claim against the state within the purview of the Eleventh Amendment, that the state had not waived its sovereign immunity, and that, accordingly, the claim was barred. Allen v. Blackhawk School District, Civil Action No. 73-921 (W.D. Pa. 1974) (unreported). This court affirmed without opinion. 515 F.2d 506 (3d Cir. 1975).

The question presented by this second appeal is whether plaintiffs can avoid the previous disposition of their claims by changing, as they have, the named parties defendant while seeking identical relief on identical claims. The district court concluded that "a mere substitution of titular party defendants does not operate to shield plaintiffs from the scope of our prior ruling" and, again, dismissed the complaint. We affirm.

By naming individual officers as defendants, plaintiffs have tried to fit their second action within the principle of Ex parte Young, 209 U.S. 123 (1908), which allows certain kinds of claims to be asserted against individual state officers though the Eleventh Amendment would bar such claims against the state itself. Although Ex parte Young is firmly embedded in our law, that case and its progeny do not abrogate the Eleventh Amendment, nor do they reduce sensitive Eleventh Amendment issues to mere formalities of pleading.

> It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. Edelman v. Jordan, 415 U.S. 651 (1974); Poindexter v. Greenhow, 114 U.S. 270, 287 (1885); Cunningham v. Macon & Brunswick R. Co., 109 U.S. 446 (1883). Its applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." Ex parte New York, 256 U.S. 490, 500 (1921).

Scheuer v. Rhodes, 416 U.S. 232, 237 (1974). After careful and thorough analysis, the district court in the prior action determined that the claim was barred by sovereign immunity, and we affirmed that determination. The "essential nature and effect" of the present proceeding is identical to that of the prior action. The prior determination, therefore, continues to control. See Bruszewski v. United States, 181 F.2d 419, 422 (3d Cir.), cert. denied, 340 U.S. 865 (1950).

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

STAPLETON, District Judge, Concurring:

I am unable to join in the holding of the Court that appellants are barred from pursuing this action by the doctrine of collateral estoppel. Nor do I believe that this action, which seeks injunctive relief against numerous individuals who have allegedly violated appellants' constitutional rights under color of state law, is barred by the Eleventh Amendment. Nevertheless, I would affirm the judgment below on the ground that the complaint fails to state a claim upon which relief can be granted.

The complaint reflects that appellants have two objectives in this case: (1) "to enjoin all further taxation" of themselves for school purposes, and (2) to require the establishment of a "just plan for distribution of public school tax monies so that plaintiffs' children [who attend a sectarian school] will enjoy the use of school tax funds on a per capita footing equal with all other students of the Commonwealth". Appellants' pursuit of their first objective is barred by Section 1341 of Title 28 which prohibits a Federal District Court from enjoining the collection of a state tax where an adequate remedy is available in a state court. Such a remedy is available in Pennsylvania to one who claims that a tax law is unconstitutional. E.g., Rochester & Pittsburgh Coal Co. v. Board of Assessment, 438 Pa. 506, 266 A.2d 78 (Sup. Ct. 1970); County of Allegheny v. Three Rivers Management Corp., 328 A.2d 567 (Pa. Cmwlth, 1974); Phipps v. School District of Pittsburgh, 111 F.2d 393 (3rd Cir. 1940).

Appellants' second objective is barred by the First Amendment. They claim that the Pennsylvania public school system teaches a "religion" of "secular humanism"; they do not, however, seek to enjoin the teaching of that religion in the public schools.

Rather, the relief which appellants seek is the allocation of public funds for the support of the Beaver County Christian School, a sectarian institution, and, under the teachings of Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) and Sloan v. Lemon, 413 U.S. 825 (1973), such relief would violate the Establishment Clause. Accordingly, the relief sought would be foreclosed as a matter of law whether or not appellants were able to show that the public schools of the Commonwealth also teach a religion.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-1839

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors

KARL CUNNINGHAM and JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM, DIANE MARIE CUNNINGHAM and KAREN KAY CUNNINGHAM, minors

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors

JOHN H. WHITE and NORMA WHITE, his wife, suing in their own right and as parents and natural guardians of NATALIE WHITE and STEPHANIE WHITE, minors

WILLIAM VISS and CHARLOTTE VISS, his wife, suing in their own right and as parents and natural guardians of STANLEY VISS, CAROL VISS and JONATHAN VISS, minors,

Appellants

v.

JOHN C. PITTENGER, Secretary of Education; GRACE SLOAN, Treasurer; ISRAEL PACKEL, Attorney General; of the Commonwealth of Pennsylvania

and

HAROLD MARTIN, STEVEN RHODES, ROBERT VEON, HARRY FRY, RONALD STURM, PETER DeCARO, BOB HAGEN, JOHN RUKAS and DOM CASEY and their successors in office, DIRECTORS OF BIG BEAVER FALLS AREA SCHOOL DISTRICT

and

LeROY STEWARD, ROBERT CAUGHNER, DAVID GROPP, AMELIA FUSCO, ROBERT AMALIA, ROBERT BERNHARDY, WILLIAM LIEBERMAN, WILLIAM G. DANNELS and BILLIE WALLACE and their successors in office. DIRECTORS OF BLACKHAWK SCHOOL DISTRICT

- - -

Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civil No. 75-1389)

Present: ALDISERT and GARTH, Circuit Judges and STAPLETON, District Judge*

J U D G M E N T

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6).

*Honorable Walter K. Stapleton, of the United States District Court for the District of Delaware, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 23, 1976, be and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

Clerk

April 19, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID J. ALLEN and VINETTA MAE ALLEN, his wife, suing in their own right and as parents and natural guardians of LEASA MAE MOXLEY, TAMELL ESTELLE MOXLEY, WANDA GAYLE ALLEN and EDWINA MIRIAM MOXLEY, minors

KARL CUNNINGHAM and JOAN CUNNINGHAM, his wife, suing in their own right and as parents and natural guardians of DOUGLAS KARL CUNNINGHAM, DIANE MARIE CUNNINGHAM and KAREN KAY CUNNINGHAM, minors

WILBERT MOORE and PHYLLIS MOORE, his wife, suing in their own right and as parents and natural guardians of SUSAN PAULA MOORE, LINDA JANE MOORE, minors

JOHN H. WHITE and NORMA WHITE, his wife, suing in their own right and as parents and natural guardians of NATALIE WHITE and STEPHANIE WHITE, minors

WILLIAM VISS and CHARLOTTE VISS, his wife, suing in their own right and as parents and natural guardians of STANLEY VISS, CAROL VISS and JONATHAN VISS, minors,
Plaintiffs

v.

BLACKHAWK SCHOOL DISTRICT
BIG BEAVER FALLS AREA SCHOOL DISTRICT
and COMMONWEALTH OF PENNSYLVANIA,
Defendants.

CIVIL ACTION
NO. 73-921

OPINION

MILLER, J.

The plaintiffs, styling their complaint in equity for injunctive and declaratory relief, seek the convokation of a three-judge court to "Declare the present school tax

laws [1]/ [of the Commonwealth] to be unconstitutional as to ... [the] plaintiffs; ... Declare the Pennsylvania Constitution Article 3 Section B-15 [2]/ unconstitutional insofar as it may be regarded to constitute a barrier to the distribution of educational tax funds to or on behalf of ... [the] plaintiffs for the education of their children and their children of their community .... To direct the Commonwealth of Pennsylvania to put into effect with all deliberate speed an equitable and just distribution of public school tax monies so that plaintiffs children will enjoy the use of school tax funds on a per capita footing equal with all other students of the Commonwealth without reference to religion.... To enjoin all further taxation of ... [the] plaintiffs pending effectuation of relief prayed for above, or, in the alternative, to direct ... [the] plaintiffs and the members of the class to which they belong to pay their proper school funds into an escrow account to be held by ... [this] Court pending adjudication of this matter." 3/

1/ These laws asserted by the plaintiffs in paragraph 12 of their complaint are 24 P.S. §101 et seq., P.L. 30, March 14, 1949, known as the "Public School Code of 1949." Reference is further made to 24 P.S. §82-213, Right to sue and be sued; §6-602, Tax Levies; §6-603, One Annual Levy of Tax Levy; §6-610, Use of school funds; illegal use; §6-652, Tax levy; purposes, limitations; §6-674, Property subject to tax; school districts second class; §6-679, Per capita taxes; §6-680, List of residents for per capita tax purposes; §6-686, Delinquent taxes; appointment of collector, etc.

2/ The text of Article III, §15, is as follows: "No money raised for the support of the Public Schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

3/ Plaintiffs' prayer for relief in their complaint.

Motions to dismiss the plaintiffs' action have been filed by the Commonwealth of Pennsylvania, Blackhawk School District and Big Beaver Falls Area School District. The defendant school districts allege as grounds for their motion that the complaint fails to state a claim upon which relief can be granted; the matter in controversy does not involve any federal question under the Constitution of the United States; the defendants are School Districts and as such are an agency of the Commonwealth and that the entire process and operation of defendants' educational system is prescribed, promulgated, approved and controlled by legislation of the Commonwealth and guidelines issued by the Department of Education of the Commonwealth. Therefore, defendant school districts are without power or authority to grant relief to the plaintiffs as prayed for in their complaint because any such relief must come, if granted by the Court, through and from the Commonwealth by legislative action; and, the relief sought is expressly prohibited by the provisions of Article III, Section 15 of the Constitution of the Commonwealth and no such relief could be granted to plaintiffs unless the Constitution was so amended.

The Commonwealth avers as grounds for its motion that the complaint fails to state a claim upon which relief may be granted; the complaint fails to contain a short and plain statement of the grounds upon which the Court's jurisdiction depends as mandated by Rule 8(a), F.R.C.P.; the Court lacks jurisdiction over the subject matter; the claim is barred by the Eleventh Amendment of the Federal Constitution; and the Commonwealth is immune from suit under the doctrine of sovereign immunity.

The complaint discloses the plaintiffs are residents of the Blackhawk and Big Beaver Falls Area School Districts, Beaver County, Commonwealth of Pennsylvania. The Allens aver they are members of the Portersville Christian School Association and their children attend its school. The Cunninghams, Moores, Whites and Visses aver they are members of the Beaver County Christian School Association and their children attend its school. All plaintiffs relate they have paid varying sums, less than $500 in all but the Cunninghams' case, as school taxes to the defendant districts for 1973, in addition to the payment of tuition costs or contributions to their respective Christian School Associations. The plaintiffs maintain, among other matters, that they have paid school taxes in violation of their religious conscience and convictions. They also complain of paying six per cent of the purchase price or goods and services imposed under the Commonwealth's Sales and Use Tax to the Commonwealth, which revenue is applied by the Commonwealth for educational funding to the exclusion of the plaintiffs. Their complaint is founded upon the core allegation that the public schools promote the "religion" of secular humanism in their classrooms and the Commonwealth and defendant School Districts are violating the freedom of religion clauses, United States Constitution, Amendment I, by levying school taxes as well as imposing sales and use taxes upon certain of plaintiffs' purchases which revenue, derived from these sources, is being used to promote and support a "religious faith" hostile to the plaintiffs' beliefs.[4/] In other words, their religious freedom is impaired by imposition and

4/ Plaintiffs' complaint, paragraphs 21, 24.

payment of taxes used to promote a religion hostile to plaintiffs' faith and the defendants are violating the establishment clause by their operation of the public school system.

Recognizing the historical establishment of the public school system as a fact,[5/] and the impasse confronting them when faced with Constitutional and decisional authorities critical of state aid related to religious schools, the plaintiffs postulate a remedy for judicially compelled redistribution of school tax funds.[6/] As stated by the plaintiffs, their "... concern is that of justice over against the historical development of the economic monopoly of the public school as it presently manifests itself. * * * It is hoped ... the instant litigation might break a trail; a new way of economic liberty in education for all parents who in good conscience seek an alternative to the present educational order."[7/]

There are numerous issues raised. However, we shall first examine the complaint in light of the objections thereto and general requirements of Rule 8(a)(2), F.R.Civ.P. A review thereof reveals the plaintiffs have not set forth a short plain statement of the grounds upon which the Court's jurisdiction depends. The only statement relates to this Court's appointment of a three-judge court under 28 U.S.C.A. §2284.[8/] Plaintiffs do, however, in their brief in opposition to the defendants' motions cite 28 U.S.C.A. §§1331, 1343(3), 2201, 2202; 42 U.S.C.A. §1983 and the First Amendment to the Federal Constitution as the basis for this Court's jurisdiction.

5/ Plaintiffs' opposition brief at page 1.
6/ Plaintiffs' complaint, paragraph 25.
7/ Plaintiffs' opposition brief at page 1.
8/ The statutory authority for the designation and composition of a three-judge court clearly vests with the Chief Judge of the Circuit Court of Appeals and not with this Court.

No reference is made to 28 U.S.C.A. §2281 or the requirements thereof.

In the present posture of this equity action, we shall, without considering the merits of the same, treat that which we consider to be the dispositive issue, viz., whether we have jurisdiction to adjudicate the matter. For it is so fundamental no citation of authority is necessary that federal district courts are empowered to hear only such cases as are within the judicial power of the United States as defined by the United States Constitution and that have been entrusted to them by a legislative grant from Congress. In the course of considering this issue, it becomes necessary to determine the essential nature and effect of the proceedings in relation to the Eleventh Amendment or sovereign immunity averments of the defendants.

Ratified in 1798, and unchanged since, the Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although the Amendment by its terms does not bar suits against a State by its own citizens, the Supreme Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her citizens as well as by citizens of another State. Hans v. Louisiana, 134 U.S. 1 (1890); Duhne v. New Jersey, 251 U.S. 311 (1920); Great Northern Insurance Co. v. Read, 322 U.S. 47 (1944); Employees v. Missouri Public

Health Dept., 411 U.S. 279 (1973). In Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), the Court held that even though a State is not named a party to the action, the suit may nonetheless be barred by the amendment. In determining the essential nature and effect of the suit, the Court stated:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Id. at 464.

And in Scheuer v. Rhodes, ___ U.S. ___, 42 U.S.L.W. 4543 (April 16, 1974), the Court reaffirmed these principles when it stated:

> "It is well-established that the Amendment bars suits not only against the State when it is the named party but when it is the party in fact. [Citations omitted]. Its applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record.' [Citations omitted.]"

Responding to the Eleventh Amendment averments, plaintiffs seek to circumvent these precedents by citing Smyth v. Ames, 169 U.S. 466 (1898) and Ex Parte Young, 209 U.S. 123 (1908). We believe plaintiffs' reliance upon these authorities to be misplaced as those cases are clearly distinguishable from this

proceeding. Here the Commonwealth of Pennsylvania is not only a named defendant but the subject matter in controversy is the public school system mandated by Article 3, §14 of the Constitution of the Commonwealth[9/] and legislative enactments concerning their support and maintenance.[10/] Indeed, the public schools of the Commonwealth, as Mr. Chief Justice Kephart noted in Wilson v. Philadelphia School District, 328 Pa. 225 (1937), "... became an integral part of our governmental system as a *state* institution ... [a]fter Thaddeus Stevens' and Governor Wolf's famous crusade for education .... The Constitution of 1874 fortified it and directed the legislature to maintain 'a thorough and efficient system of public schools' ... The school system, or *the school districts, then, are but agencies of the state legislature to administer this constitutional duty.*" Id. at 230-231. (Emphasis added). Moreover, in levying, collecting and spending taxes a school district acts merely as an agent of the Commonwealth in the discharge of the latter's constitutional duty of providing a system of public education. Hartman v. Columbia Malleable Castings Corp. 164 Pa. Super. 1 (1949). And, unlike municipal corporations within the Commonwealth, the school districts possess no legislative powers, but only administrative powers expressly granted by the legislature or inferred by necessary implication.[11/] In Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (W.D. Pa. 1974), Judge Teitelbaum of this Court in considering whether defendant universities were "persons" under 42 U.S.C.A. §1983 observed "[t]he question ... is to some extent the same question

9/ The text reads as follows: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth
10/ See n. 1 supra.
11/ 33 P.L.E. Schools §81 et seq.

as whether that entity is immune from liability under the principles of sovereign immunity or the Eleventh Amendment." Id. at 1125. The Court determined both questions turn on the extent of government control, whether exercised or not, over the entities. Thus, where the state *controls* the activities of the entity, the entity is properly a state instrumentality. Moreover, our Court of Appeals has recently held in Rochester v. White, No. 73-2104 (3 Cir., September 5, 1974), "[w]hen a state is named as a defendant under Section 1983, there are two impediments to suit. First, a state is not a person as required under Section 1983, and second, the Eleventh Amendment bars suit against a state." Id. at p. 4.

Testing the plaintiffs' complaint under the principles above enunciated, we are persuaded the essence and effect of this proceeding is against the Commonwealth as the party in fact, the school districts being the "alter ego" of the Commonwealth to administer the latter's constitutional duty of providing a system of public education. It is crystal clear the Commonwealth controls the activities of the defendant school districts. Therefore, we must determine whether the Commonwealth has consented or otherwise waived its sovereign immunity for if not, we are without jurisdiction. Gambocz v. Sub-Committee on Claims of J.Leg. Com., N.J. Leg., 423 F. 2d 674 (3 Cir. 1970); cf. Litton FCS, Inc. v. Pennsylvania Turnpike Commission, 376 F.Supp. 579 (E.D. Pa. 1974). Under Article I,

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§11 of the Constitution of the Commonwealth[12], the Commonwealth's immunity from suit is constitutionally mandated and is not self-executing thereby requiring the legislature to determine the circumstances under which sovereign immunity may be waived. Brown v. Commonwealth, 453 Pa. 566 (1973). The Court in Sweigard v. Pa. Dept. of Trans., 454 Pa. 32 (1973), citing its decision in Brown held, in rejecting the contention that the section waived sovereign immunity, the constitutional provision operated to *establish* sovereign immunity. Thus, the general rules pertaining to sovereign immunity noted by the Court earlier in Philadelphia Life Insurance Company v. Commonwealth, 410 Pa. 571 (1963) and the distinctions recognized therein remain valid.[13] Of particular relevance to this equity action is the following observation by the Court:

> "The distinction is clear between suits against the Commonwealth which are within the rule of its immunity and suits to restrain officers of the Commonwealth from enforcing the provisions of a statute claimed to be

12/ The text of the pertinent provision is as follows: "... Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."

13/ Compare with Twps. of Springdale and Wilkins v. Kane, 11 Pa. Cmwlth. 254, 263 (1973) where the court observed, "It is of prime importance to note that the plaintiffs are not seeking some affirmative action on the part of State officials required by statute, but rather that the affirmative action sought is mandated by the constitutional provision." See Biello v. Pa. Liquor Control Bd., 454 Pa. 179 (1973) applying sovereign immunity to Liquor Control Board determined to have been acting in governmental capacity when it sold a bottle of whiskey to a minor. Koynok v. Commonwealth, 12 Pa. Cmwlth 375 (1974) extending sovereign immunity to actions in equity and holding doctrine precludes prosecution against instrumentalities, here State Board of Private Academic Schools of Commonwealth engaged in governmental functions. Williams v. Commonwealth, 12 Pa. Cmwlth 384 (1974) holding agencies of the Commonwealth allegedly acting or failing to act in a governmental capacity are cloaked with sovereign immunity granted by the Constitution of Pennsylvania until the legislature waives such immunity.

> unconstitutional. Suits which seek to compel *affirmative action on the part of state officials* or *to obtain money damages or to recover property from the Commonwealth* are within the rule of immunity; suits which simply seek *to restrain state officials* from performing affirmative acts are not within the rule of immunity." Id. at 576.

Our research has not detected legislation applicable to this action whereby the Commonwealth has consented to being sued or otherwise waived its sovereign immunity nor have the parties directed our attention to the same. To the contrary, Rule 2102(a), R.Civ.P.,[14] exemplifies the doctrine that a suit against the Commonwealth is permitted only when a cause of action against it exists and when a right of action has been authorized by statute.[15]

In the absence of a clear and unequivocal waiver by the General Assembly[16] of the Commonwealth's sovereign immunity, we believe the functions and responsibilities before us to be governmental functions protected by the Commonwealth's sovereign immunity or Eleventh Amendment. And as Mr. Justice Douglas stated in Employees v. Missouri Public Health Dept., 411 U.S. at 284, "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State."

14/ 12 P.S.App. The text of the Rule is as follows: "An action by the Commonwealth shall be brought in the name of the Commonwealth of Pennsylvania."

15/ Collins v. Commonwealth, 262 Pa. 572 (1919) cited in the note to Rule 2102, R.Civ.P.

16/ Daye v. Commonwealth of Pennsylvania, 483 F. 2d 294 (3 Cir 1973) U.S. App. pending, 40 L.E.2d 298, 94 S.C. 1956 (1974).

In our disposition of this action, we of course are not unaware of the current financial hardships upon the nonpublic schools and the burdens experienced by the plaintiffs who must pay public school taxes and at the same time elect to support nonpublic schools. However, we are likewise mindful of the Supreme Court's views respecting traditional limitations of federal courts' functions when in San Antonio School District v. Rodriguez, 411 U.S. 1, 58 (1973), it stated:

> "The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand."

An appropriate order shall be entered.

ORDER OF COURT

AND NOW, to-wit, this 25 day of September, 1974, it is hereby ORDERED and DIRECTED that the Motions to Dismiss filed by the defendants be and the same hereby are granted.

J. P. Weber
United States District Judge

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PUBLIC SCHOOL CODE OF 1949

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§ 2--213. Right to sue and be sued

Each school district shall have the right to sue and be sued in its corporate name. Any legal process against any school district shall be served on the president or secretary of its board of school directors. 1949, March 10, P.L. 30, art. II, § 213.

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§ 6--602. Tax levies

All taxes required by any school district, in addition to the State appropriation, shall be levied by the board of school directors therein. 1949, March 10, P.L. 30, art. VI, § 602.

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§ 6--610. Use of school funds; illegal use

The board of school directors in every school district shall have the right to use and pay out, in the manner herein provided, any funds of the district for any and all of the purposes therein provided, subject to all the provisions of this act.[1] The use or payment of any public school funds of any school district, in any manner or for any purpose not provided in this act, shall be illegal. 1949, March 10, P.L. 30, art. VI, § 610.

§ 6--652. Tax levy; purposes; limitations

In all school districts of the first class and first class A the school taxes for the following fiscal year shall be levied annually, by the board of public education thereof, on or after the second Monday of November and before the first Monday of December following. The board of public education thereof shall annually levy a tax on each dollar of the total assessments of all property assessed and certified for taxation in said district, which tax shall be ascertained, determined, and fixed by adding together the following:

(1) An amount which, with all moneys received from the Commonwealth applicable thereto, shall be sufficient to pay the minimum salaries and increments of the teaching and supervisory staff thereof as fixed and provided by law and to pay the contributions of said district to the teachers' retirement system. For the purpose of computing the amount required to pay the mimimum salaries and increments fixed by law, but without otherwise limiting the rights of the district to employ teachers or other employes, (i) The number of teachers on the salary schedule of the elementary schools shall not exceed one for every thirty pupils in average daily membership in such schools, (ii) The number of teachers on the salary schedule of the junior high schools shall not exceed one for every twenty-two pupils in average daily membership in such schools, (iii) The number of teachers on the salary schedule of the senior high schools

shall not exceed one for every twenty-two pupils in average daily membership in such schools, (iv) The number of teachers with salaries and increments fixed by law, on any salary schedule now established or hereafter established, and not specially mentioned in this act, shall not exceed one for every twenty-two pupils in average daily membership, (v) The number of principals in the elementary schools, and the principals in charge of all other character of schools now established or hereafter established, and not specially mentioned in this act, shall not exceed one for every six hundred pupils in average daily membership in such schools, (vi) The number of principals in the junior and senior high schools shall not exceed one for every twelve hundred pupils in average daily membership in such schools, (vii) The number of supervisors in all schools shall not exceed one for every fifteen hundred pupils in average daily membership, (viii) The number of attendance officers and home and school visitors shall not exceed one for every two thousand pupils in average daily membership in all elementary and secondary schools, (ix) In all adult and extension school classes, the number of teachers shall not exceed one for every twenty pupils in average daily membership in such schools.

The salary and increments, fixed by law, of members of the teaching and supervisory staff whose number is not in some manner limited hereby, shall not be included within the purposes authorized by clause (1) of this section, but shall be construed and regarded as constituting expenses within the meaning of clause (3) of this section.

Average daily membership, as used herein, shall be based upon membership during the preceding school term.

(2) An amount sufficient to pay the interest on, and retire at maturity the principal of, the indebtedness of said district incurred as authorized by law.

(2.1) An amount sufficient to pay any rentals agreed to be paid to the State Public School Building Authority or any other authority created by the General Assembly, having State-wide jurisdiction.

(3) An amount sufficient to pay all other expenses and requirements of said school district, which amount shall be equivalent to not less than three, nor more than five, mills on the dollar of the total assessment of all property assessed and certified for taxation therein.

The total annual school tax levy for all purposes in any school district of the first class shall not be more than eleven and three-quarter (11 3/4) mills on the dollar of the total assessment of all property assessed and certified for taxation in the territory constituting the district. 1949, March 10, P.L. 30, art. VI, § 652; 1949, May 2, P.L. 855, § 1; 1949, May 9, P.L. 1017, § 1; 1951, May 29, P.L. 436, § 1.

§ 6--674. Property subject to tax; districts second class

In school districts of the second class, the school taxes shall be levied and assessed on the real estate and personal property therein, as contained in the assessment used for tax purposes in the city, borough, incorporated town or township in which the school district is located. Where the school district of the second class is not located wholly within the boundary lines of a city, the school taxes shall be levied and assessed on the real estate and personal property therein as contained in the assessment made for county tax purposes. 1949, March 10, P.L. 30, art. VI, § 674; 1949, May 9, P.L. 937, § 1.

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§ 679. Per capita taxes

Each resident or inhabitant, over twenty-one years of age, in every school district of the second, third, and fourth class, which shall levy such tax, shall annually pay, for the use of the school district in which he or she is a resident or inhabitant, a per capita tax of not less than one dollar nor more than five dollars, as may be assessed by the local school district. Every husband against whose wife a per capita tax is levied shall be liable for the payment of such tax. Collection thereof from such husband may be made and enforced in the manner provided by law for the collection and enforcement of payment of other taxes owing by such husband, including the collection thereof from the husband's employer. 1949, March 10, P.L. 30, art. VI, § 679.

§ 6--680. List of residents for per capita tax purposes

(a) In order that the board of school directors of each school district of the second, third, or fourth class may assess, levy, and collect a per capita tax of not less than one dollar nor more than five dollars on each resident or inhabitant over twenty-one years of age in the district, it shall be the duty of the proper assessors in each such school district to prepare a list of residents or inhabitants in such school district over twenty-one years of age, and return the same with the other taxable property in the district, as provided by law. In each school district all such lists of residents or inhabitants shall be included and certified in the list of taxable property to be certified to the board of school directors in each such school district, as herein provided. Assessors whose assessment district includes the whole or parts of more than one school district shall return separate lists of residents and inhabitants of each such school district.

(b) Every resident or inhabitant in any school district, upon attaining twenty-one years of age, and every

person twenty-one years of age or over becoming a resident or inhabitant in any school district, shall, within twelve months after the happening thereof, notify the proper assessors of his becoming of age or becoming a resident or inhabitant. Any person failing, within said period, to notify the assessors of the school district within which he resides, shall, in addition to the tax levied by such school district, be liable to such school district in a penal sum equal to such tax.

The board of school directors shall, at the same time as they give public notice of a proposed budget, include a notice of the requirements of this subsection, together with the name and address of the assessor to be notified. 1949, March 10,P.L.30,art.VI,§680;1951,June 30,P.L.962, No.193,§1.

§ 6-686. Delinquent taxes; appointment of collector; etc.

(a) In all school districts of the second, third and fourth class, all unpaid school taxes assessed and levied upon real property upon which there is no personal property out of which the same can be collected, shall be certified by the tax collector to the secretary of the board of school directors, together with a proper description of the property upon which the same is levied, on or before the first day of June in each year. All delinquent school taxes so certified to the board of school directors in any school district of the second, third or fourth class, by any school tax collector, shall be collected by said board as provided by law.

(b) The board of school directors in such district may annually, on or before the first Monday of July in each year, appoint one or more suitable persons, as delinquent tax collectors in said school district, to collect any and all school taxes from the collection of which the original tax collector has been exonerated, in accordance with the laws of this Commonwealth, and which taxes still remain unpaid upon any of the school tax duplicates, other than such unpaid school taxes as shall

have been filed as liens in the office of the prothonotary, or have been returned to the county commissioners for sale. Such delinquent tax collector or collectors shall, upon the certification over to him or them of such taxes so remaining unpaid, proceed to collect the same from the persons respectively charged therewith, for which purpose he or they shall have all the authority and power now vested by law in any collector of school taxes for the collection of such taxes. The board of school directors issuing the original warrants shall issue an additional warrant to the collector or collectors of such delinquent taxes so appointed.

(c) Collectors of delinquent school taxes so appointed shall give bond in the same manner as required of the original tax collector, and shall be paid such commissions or compensation as is paid the regular collector. Such commissions or compensation shall be paid by proper orders drawn on the school treasurer as other accounts are paid by the school district. Every such collector of delinquent school taxes shall be responsible and account to the board of school directors for all such taxes collected by him in like manner and in accordance with existing laws pertaining to school tax collections. 1949,March 10,P.L.30,art.VI,§686.